

## **Part 1**

### **Unauthorized Insurers and Surplus Lines**

#### **31A-15-101 Purposes.**

It is the purpose of this chapter to:

- (1) prevent evasion by unauthorized insurers of the regulatory and tax laws of Utah and protect Utah and its residents against loss from that type of evasion;
- (2) subject unauthorized insurers and other persons doing an insurance business in Utah to the jurisdiction of the Utah commissioner and courts;
- (3) protect authorized insurers from unfair competition by unauthorized insurers; and
- (4) provide an orderly method, under reasonable and practical safeguards, for procuring insurance from unauthorized insurers.

Enacted by Chapter 242, 1985 General Session

#### **31A-15-102 Assisting unauthorized insurers.**

- (1) No person may do any act enumerated under Subsection (2) who knows or should know that the act may assist in the illegal placement of insurance with an unauthorized insurer or the subsequent servicing of an insurance policy illegally placed with an unauthorized insurer.
- (2) An act performed by mail is performed both at the place of mailing and at the place of delivery. Any of the following acts, whether performed by mail or otherwise, fall within the prohibition of Subsection (1):
  - (a) soliciting, making, or proposing to make an insurance contract;
  - (b) taking, receiving, or forwarding an application for insurance;
  - (c) collecting or receiving, in full or in part, an insurance premium;
  - (d) issuing or delivering an insurance policy or other evidence of an insurance contract except as a messenger not employed by the insurer, or an insurance producer;
  - (e) doing any of the following in connection with the solicitation, negotiation, procuring, or effectuation of insurance coverage for another: inspecting risks, setting rates, advertising, disseminating information, or advising on risk management;
  - (f) publishing or disseminating any advertisement encouraging the placement or servicing of insurance that would violate Subsection (1); however this provision does not apply to publication or dissemination to an audience primarily outside Utah that also reaches persons in Utah unless the extension to persons inside Utah can be conveniently avoided without substantial expense other than loss of revenue; nor does it apply to regional or national network programs on radio or television unless they originate in Utah;
  - (g) investigating, settling, adjusting, or litigating claims; or
  - (h) representing or assisting any person to do an unauthorized insurance business or to procure insurance from an unauthorized insurer.
- (3) Subsection (1) does not prohibit:
  - (a) an attorney acting for a client;
  - (b) a full-time salaried employee of an insured acting in the capacity of an insurance buyer or manager; or
  - (c) insurance activities described under Section 31A-15-103.
- (4) Any act performed in Utah which is prohibited under this section constitutes appointment of the commissioner or the lieutenant governor as agent for service of process under Sections 31A-2-309 and 31A-2-310.

- (5) Any person or entity who knows or should know that the person's or entity's actions assist in the illegal placement of insurance in violation of this section is guilty of a third degree felony.

Amended by Chapter 58, 2005 General Session

**31A-15-103 Surplus lines insurance -- Unauthorized insurers.**

- (1) Notwithstanding Section 31A-15-102, a foreign insurer that has not obtained a certificate of authority to do business in this state under Section 31A-14-202 may negotiate for and make an insurance contract with a person in this state and on a risk located in this state, subject to the limitations and requirements of this section.
- (2)
- (a) For a contract made under this section, the insurer may, in this state:
- (i) inspect the risks to be insured;
  - (ii) collect premiums;
  - (iii) adjust losses; and
  - (iv) do another act reasonably incidental to the contract.
- (b) An act described in Subsection (2)(a) may be done through:
- (i) an employee; or
  - (ii) an independent contractor.
- (3)
- (a) Subsections (1) and (2) do not permit a person to solicit business in this state on behalf of an insurer that has no certificate of authority.
- (b) Insurance placed with a nonadmitted insurer shall be placed with a surplus lines producer licensed under Chapter 23a, Insurance Marketing - Licensing Producers, Consultants, and Reinsurance Intermediaries.
- (c) The commissioner may by rule prescribe how a surplus lines producer may:
- (i) pay or permit the payment, commission, or other remuneration on insurance placed by the surplus lines producer under authority of the surplus lines producer's license to one holding a license to act as an insurance producer; and
  - (ii) advertise the availability of the surplus lines producer's services in procuring, on behalf of a person seeking insurance, a contract with a nonadmitted insurer.
- (4) For a contract made under this section, a nonadmitted insurer is subject to Sections 31A-23a-402, 31A-23a-402.5, and 31A-23a-403 and the rules adopted under those sections.
- (5) A nonadmitted insurer may not issue workers' compensation insurance coverage to an employer located in this state, except for stop loss coverage issued to an employer securing workers' compensation under Subsection 34A-2-201(3).
- (6)
- (a) The commissioner may by rule prohibit making a contract under Subsection (1) for a specified class of insurance if authorized insurers provide an established market for the class in this state that is adequate and reasonably competitive.
- (b) The commissioner may by rule place a restriction or a limitation on and create special procedures for making a contract under Subsection (1) for a specified class of insurance if:
- (i) there have been abuses of placements in the class; or
  - (ii) the policyholders in the class, because of limited financial resources, business experience, or knowledge, cannot protect their own interests adequately.
- (c) The commissioner may prohibit an individual insurer from making a contract under Subsection (1) and all insurance producers from dealing with the insurer if:
- (i) the insurer willfully violates:

- (A) this section;
- (B) Section 31A-4-102, 31A-23a-402, 31A-23a-402.5, or 31A-26-303; or
- (C) a rule adopted under a section listed in Subsection (6)(c)(i)(A) or (B);
- (ii) the insurer fails to pay the fees and taxes specified under Section 31A-3-301; or
- (iii) the commissioner has reason to believe that the insurer is:
  - (A) in an unsound condition;
  - (B) operated in a fraudulent, dishonest, or incompetent manner; or
  - (C) in violation of the law of its domicile.
- (d)
  - (i) The commissioner may issue one or more lists of unauthorized foreign insurers whose:
    - (A) solidity the commissioner doubts; or
    - (B) practices the commissioner considers objectionable.
  - (ii) The commissioner shall issue one or more lists of unauthorized foreign insurers the commissioner considers to be reliable and solid.
  - (iii) In addition to the lists described in Subsections (6)(d)(i) and (ii), the commissioner may issue other relevant evaluations of unauthorized insurers.
  - (iv) An action may not lie against the commissioner or an employee of the department for a written or oral communication made in, or in connection with the issuance of, a list or evaluation described in this Subsection (6)(d).
- (e) A foreign unauthorized insurer shall be listed on the commissioner's "reliable" list only if the unauthorized insurer:
  - (i) delivers a request to the commissioner to be on the list;
  - (ii) establishes satisfactory evidence of good reputation and financial integrity;
  - (iii)
    - (A) delivers to the commissioner a copy of the unauthorized insurer's current annual statement certified by the insurer; and
    - (B) continues each subsequent year to file its annual statements with the commissioner within 60 days of the day on which it is filed with the insurance regulatory authority where the insurer is domiciled;
  - (iv)
    - (A)
      - (I) is in substantial compliance with the solvency standards in Chapter 17, Part 6, Risk-Based Capital, or maintains capital and surplus of at least \$15,000,000, whichever is greater; and
      - (II) maintains in the United States an irrevocable trust fund in either a national bank or a member of the Federal Reserve System, or maintains a deposit meeting the statutory deposit requirements for insurers in the state where it is made, which trust fund or deposit:
        - (Aa) shall be in an amount not less than \$2,500,000 for the protection of all of the insurer's policyholders in the United States;
        - (Bb) may consist of cash, securities, or investments of substantially the same character and quality as those which are "qualified assets" under Section 31A-17-201; and
        - (Cc) may include as part of the trust arrangement a letter of credit that qualifies as acceptable security under Section 31A-17-404.1; or
    - (B) in the case of any "Lloyd's" or other similar incorporated or unincorporated group of alien individual insurers, maintains a trust fund that:
      - (I) shall be in an amount not less than \$50,000,000 as security to its full amount for all policyholders and creditors in the United States of each member of the group;

- (II) may consist of cash, securities, or investments of substantially the same character and quality as those which are "qualified assets" under Section 31A-17-201; and
  - (III) may include as part of this trust arrangement a letter of credit that qualifies as acceptable security under Section 31A-17-404.1; and
  - (v) for an alien insurer not domiciled in the United States or a territory of the United States, is listed on the Quarterly Listing of Alien Insurers maintained by the National Association of Insurance Commissioners International Insurers Department.
- (7)
- (a) Subject to Subsection (7)(b), a surplus lines producer may not, either knowingly or without reasonable investigation of the financial condition and general reputation of the insurer, place insurance under this section with:
    - (i) a financially unsound insurer;
    - (ii) an insurer engaging in unfair practices; or
    - (iii) an otherwise substandard insurer.
  - (b) A surplus line producer may place insurance under this section with an insurer described in Subsection (7)(a) if the surplus line producer:
    - (i) gives the applicant notice in writing of the known deficiencies of the insurer or the limitations on the surplus line producer's investigation; and
    - (ii) explains the need to place the business with that insurer.
  - (c) A copy of the notice described in Subsection (7)(b) shall be kept in the office of the surplus line producer for at least five years.
  - (d) To be financially sound, an insurer shall satisfy standards that are comparable to those applied under the laws of this state to an authorized insurer.
  - (e) An insurer on the "doubtful or objectionable" list under Subsection (6)(d) or an insurer not on the commissioner's "reliable" list under Subsection (6)(e) is presumed substandard.
- (8)
- (a) A policy issued under this section shall:
    - (i) include a description of the subject of the insurance; and
    - (ii) indicate:
      - (A) the coverage, conditions, and term of the insurance;
      - (B) the premium charged the policyholder;
      - (C) the premium taxes to be collected from the policyholder; and
      - (D) the name and address of the policyholder and insurer.
  - (b) If the direct risk is assumed by more than one insurer, the policy shall state:
    - (i) the names and addresses of all insurers; and
    - (ii) the portion of the entire direct risk each assumes.
  - (c) A policy issued under this section shall have attached or affixed to the policy the following statement: "The insurer issuing this policy does not hold a certificate of authority to do business in this state and thus is not fully subject to regulation by the Utah insurance commissioner. This policy receives no protection from any of the guaranty associations created under Title 31A, Chapter 28, Guaranty Associations."
- (9) Upon placing a new or renewal coverage under this section, a surplus lines producer shall promptly deliver to the policyholder or the policyholder's agent evidence of the insurance consisting either of:
- (a) the policy as issued by the insurer; or
  - (b) if the policy is not available upon placing the coverage, a certificate, cover note, or other confirmation of insurance complying with Subsection (8).

- (10) If the commissioner finds it necessary to protect the interests of insureds and the public in this state, the commissioner may by rule subject a policy issued under this section to as much of the regulation provided by this title as is required for a comparable policy written by an authorized foreign insurer.
- (11)
- (a) A surplus lines transaction in this state shall be examined to determine whether it complies with:
    - (i) the surplus lines tax levied under Chapter 3, Department Funding, Fees, and Taxes;
    - (ii) the solicitation limitations of Subsection (3);
    - (iii) the requirement of Subsection (3) that placement be through a surplus lines producer;
    - (iv) placement limitations imposed under Subsections (6)(a), (b), and (c); and
    - (v) the policy form requirements of Subsections (8) and (10).
  - (b) The examination described in Subsection (11)(a) shall take place as soon as practicable after the transaction. The surplus lines producer shall submit to the examiner information necessary to conduct the examination within a period specified by rule.
  - (c)
    - (i) The examination described in Subsection (11)(a) may be conducted by the commissioner or by an advisory organization created under Section 31A-15-111 and authorized by the commissioner to conduct these examinations. The commissioner is not required to authorize an additional advisory organization to conduct an examination under this Subsection (11)(c).
    - (ii) The commissioner's authorization of one or more advisory organizations to act as examiners under this Subsection (11)(c) shall be:
      - (A) by rule; and
      - (B) evidenced by a contract, on a form provided by the commissioner, between the authorized advisory organization and the department.
  - (d)
    - (i)
      - (A) A person conducting the examination described in Subsection (11)(a) shall collect a stamping fee of an amount not to exceed 1% of the policy premium payable in connection with the transaction.
      - (B) A stamping fee collected by the commissioner shall be deposited in the General Fund.
      - (C) The commissioner shall establish a stamping fee by rule.
    - (ii) A stamping fee collected by an advisory organization is the property of the advisory organization to be used in paying the expenses of the advisory organization.
    - (iii) Liability for paying a stamping fee is as required under Subsection 31A-3-303(1) for taxes imposed under Section 31A-3-301.
    - (iv) The commissioner shall adopt a rule dealing with the payment of stamping fees. If a stamping fee is not paid when due, the commissioner or advisory organization may impose a penalty of 25% of the stamping fee due, plus 1-1/2% per month from the time of default until full payment of the stamping fee.
    - (v) A stamping fee relative to a policy covering a risk located partially in this state shall be allocated in the same manner as under Subsection 31A-3-303(4).
  - (e) The commissioner, representatives of the department, advisory organizations, representatives and members of advisory organizations, authorized insurers, and surplus lines insurers are not liable for damages on account of statements, comments, or recommendations made in good faith in connection with their duties under this Subsection (11)(e) or under Section 31A-15-111.

- (f) An examination conducted under this Subsection (11) and a document or materials related to the examination are confidential.
- (12)
  - (a) For a surplus lines insurance transaction in the state entered into on or after May 13, 2014, if an audit is required by the surplus lines insurance policy, a surplus lines insurer:
    - (i) shall exercise due diligence to initiate an audit of an insured, to determine whether additional premium is owed by the insured, by no later than six months after the expiration of the term for which premium is paid; and
    - (ii) may not audit an insured more than three years after the surplus lines insurance policy expires.
  - (b) A surplus lines insurer that does not comply with this Subsection (12) may not charge or collect additional premium in excess of the premium agreed to under the surplus lines insurance policy.

Amended by Chapter 238, 2015 General Session

**31A-15-104 Direct placement of insurance.**

- (1) Subject to this section, any person seeking insurance may obtain it from an unauthorized insurer if no producer resident doing business in Utah is involved and if negotiations occur primarily outside Utah. Negotiations by mail occur within Utah if a letter or other document containing insurance-related solicitations or negotiations is sent from or to a Utah address. Negotiations by telephone take place within Utah if one of the parties to the conversation is in Utah.
- (2) Each policyholder who procures or renews insurance otherwise subject to this code from any insurer not authorized to do business in Utah, other than insurance procured under Section 31A-15-103 and the renewal of guaranteed renewable insurance lawfully issued outside Utah, shall within 60 days after the insurance is procured or renewed, report to the commissioner in the form required by the commissioner and pay the taxes specified by Section 31A-3-301.
- (3)
  - (a) Any insurance on personal property sold on the installment plan, under a conditional sales contract, or an equivalent security agreement under the Uniform Commercial Code which charges the buyer, as a part of the consideration in the agreement of sale for insurance on the property, shall be placed with an insurer authorized to do business in Utah.
  - (b) Whenever the law of Utah requires a person to purchase insurance on risks in Utah, it shall be obtained from an insurer authorized to do business in Utah, or under Section 31A-15-103.

Amended by Chapter 298, 2003 General Session

**31A-15-105 Effect of contracts illegal because insurer was unauthorized.**

- (1) An insurance contract entered into in violation of this chapter is unenforceable by, but enforceable against, the insurer. In an action against the insurer on the contract, the insured is bound by the terms of the contract as affected by this title and rules adopted under this title.
- (2) An insurance policy entered into in violation of this chapter is voidable by the policyholder who entered into the transaction without knowing it was illegal. The policyholder may avoid the contract by notice to the insurer, if no insured has enforced the contract by an action under Subsection (1), and may recover any consideration paid under the contract.
- (3) Any person who assisted in the procurement of an illegal contract under this chapter, and who knew or should have known the transaction was illegal, is liable to the insured for the full

amount of a claim or loss payable under the contract, if the insurer does not pay it. The receiver appointed under Chapter 27a, Insurer Receivership Act, may assert the claims of insureds if the insurer is the subject of a proceeding under Chapter 27a, Insurer Receivership Act.

Amended by Chapter 309, 2007 General Session

**31A-15-106 Servicing of contracts made out of state.**

- (1) A foreign insurer that does not have a certificate of authority to do business in this state under Section 31A-14-202 may, in this state, collect premiums and adjust losses and do all other acts reasonably incidental to contracts made outside this state without violating this chapter. Any premiums collected under this section are subject to Section 31A-3-301.
- (2) Subsection (1) does not permit a renewal, extension, increase, or other substantial change in the terms of any contract under Subsection (1) unless:
  - (a) it is permitted under Section 31A-15-103;
  - (b) the contract is for life or accident and health insurance or annuities; or
  - (c) a rule adopted by the commissioner permits this action when the interests of the policyholder and the public appear to be sufficiently protected.

Amended by Chapter 116, 2001 General Session

**31A-15-107 Defense of action by unauthorized person.**

- (1) Except under Subsection (3), no pleading, notice, order, or process in any action in court or in any administrative proceeding before the commissioner instituted against an unauthorized person under Sections 31A-2-309 and 31A-2-310 may be filed by or on behalf of the unauthorized person unless one of the following conditions exists:
  - (a) The unauthorized person deposits with the clerk of the court in which the action or proceeding is pending, or with the commissioner in administrative proceedings, cash, securities, or a bond with sureties in an amount fixed by the court or the commissioner, sufficient to secure the payment or performance of any probable final judgment or order.
  - (b) That person procures proper authorization to do an insurance business in Utah.
  - (c) The commissioner, after a hearing, issues an order stating that he is satisfied the person has funds or securities, in a state of the United States, in trust or otherwise, which are readily available and adequate to satisfy any probable final judgment or to perform in accordance with any order.
- (2) The court in any action or proceeding under this section, or the commissioner in any administrative proceeding under this section, may order any postponement he considers necessary to give the unauthorized person a reasonable opportunity to comply with Subsection (1).
- (3) Subsection (1) does not prevent an unauthorized person from filing a motion to quash a writ or to set aside service on the ground that the person has not done any of the acts specified under Subsection 31A-15-102(2).

Enacted by Chapter 242, 1985 General Session

**31A-15-108 Attorney fees.**

In an action against an unauthorized person upon a contract of insurance issued in violation of this chapter, if the unauthorized person fails to make payment in accordance with the contract for 30 days after the payment is due and demand is made, and it appears to the court that the

failure was without just cause, the court may allow the plaintiff a reasonable attorney's fee and may include the fee in any judgment that may be rendered in the action. The unauthorized person's failure to defend this action is prima facie evidence that the failure to pay was without just cause.

Enacted by Chapter 242, 1985 General Session

**31A-15-109 Investigation and disclosure of insurance contracts.**

Whenever the commissioner has reason to believe that insurance has been effectuated by or for any person in Utah with an unauthorized insurer, the commissioner may, in writing, order the person to produce for examination all insurance contracts and other documents evidencing insurance with both authorized and unauthorized insurers and to disclose to the commissioner the amount of insurance, the name and address of each insurer, the gross amount of premium, and the name and address of any person who has assisted in effecting the insurance.

Enacted by Chapter 242, 1985 General Session

**31A-15-110 Reporting of illegal insurance.**

- (1) Every person investigating or adjusting any loss or claim on a subject of insurance in this state shall immediately report to the commissioner every insurance policy or contract connected with the investigation or settlement, which the person has reason to believe has been entered into illegally by any insurer not authorized to transact business in this state.
- (2) Every person acting as an insurance consultant shall immediately report to the commissioner every insurance policy or contract covering a subject of insurance in this state, which the consultant has reason to believe has been entered into illegally by an insurer not authorized to transact that type of insurance in this state.

Amended by Chapter 204, 1986 General Session

**31A-15-111 Surplus lines advisory organizations.**

- (1) Advisory organizations of surplus lines producers may be formed to:
  - (a) facilitate and encourage compliance by its members with the laws of this state and the rules of the commissioner relative to surplus lines insurance;
  - (b) if authorized by the commissioner, perform and report to the commissioner on the confidential examinations and assess and receive the stamping fees described in Subsection 31A-15-103(11);
  - (c) make recommendations to the commissioner concerning classes of insurance for which a rule under Subsection 31A-15-103(6)(a) is appropriate;
  - (d) investigate "abuses of placements," as described in Subsection 31A-15-103(6)(b), and provide recommendations to the commissioner concerning rules under Subsection 31A-15-103(6)(b);
  - (e) bring to the commissioner's attention the existence of grounds for issuing an order under Subsection 31A-15-103(6)(c) concerning a particular unauthorized insurer;
  - (f) provide recommendations to the commissioner concerning unauthorized insurers which should be listed on a "doubtful or objectionable" list under Subsection 31A-15-103(6)(d);
  - (g) provide comments to the commissioner concerning whether an unauthorized insurer has a good reputation and financial integrity under Subsection 31A-15-103(6)(d)(ii);
  - (h) provide recommendations to the commissioner concerning rules under Subsection 31A-15-103(10) necessary to protect the interests of insureds and the public; and

- (i) receive and disseminate to its members information relative to surplus lines coverages.
- (2) Every advisory organization formed under this section shall file with the commissioner:
  - (a) a copy of its constitution, articles of agreement or association or articles of incorporation, and any amendments to these documents;
  - (b) a copy of its bylaws and any other writing governing the organization's activities and any amendments to these documents;
  - (c) a list of the names and addresses of residents of this state upon whom notices or orders of the commissioner or processes issued at his direction may be served, with changes in this list to be filed within 10 days of a change; and
  - (d) an agreement, on a form provided by the commissioner and executed by the advisory organization, that the commissioner may examine the advisory organization in accordance with the provisions of Sections 31A-2-203, 31A-2-204, and 31A-2-205.
- (3) The commissioner may by rule or order require each person licensed as a surplus lines producer under Chapter 23a, Insurance Marketing - Licensing Producers, Consultants, and Reinsurance Intermediaries, to be a member of one or more specified advisory organizations operating under this section. The commissioner may make compliance with the rule or order a condition to continued licensure as a surplus lines producer.
- (4) The comments and recommendations given the commissioner under Subsection (1) are merely advisory. The formation of an advisory organization under this section does not alter the commissioner's authority under this chapter.

Amended by Chapter 298, 2003 General Session